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RECENT CASES

Minister For Tertiary Education, Skills, Jobs And Workplace Relations [2011] FWAFB 7444 (31 October 2011)

The Workplace Relations Minister (the Federal Minister) made an application to Fair Work Australia (FWA) under section 424 of the Fair Work Act 2009 (Cth) to terminate, or in the alternative, suspend for a period of 90 days, protected industrial action being engaged in and/or threatened, impending or probable by Qantas Airways Ltd (Qantas), QCatering Limited (QCatering), The Australian Licensed Aircraft Engineers Association (ALAEA), the Transport Workers' Union of Australia (TWU) and the Australian and International Pilots Association (AIPA).

Following a marathon session in FWA, a Full Bench (comprising of Justice Giudice, Senior Deputy President Watson, and Commissioner Roe) terminated protected industrial action in relation to each proposed enterprise agreement after it found that there was evidence that Qantas' proposed industrial action (a lock out) would cause significant harm to an important part of the Australian economy.

Background

The AIPA, the TWU and the ALAEA had been negotiating with Qantas for three separate enterprise agreements to apply to pilots on long haul routes, ramp, baggage handling and catering employees and licensed aircraft engineers. The ALAEA had been in negotiations with Qantas since May 2011, the AIPA had been negotiating since July 2011 and the TWU since September 2011. These three unions had organized and engaged in protected industrial action for a number of months. The ALAEA had been engaged in industrial action since May 2011, the AIPA had been engaged in industrial action since July 2011, and the TWU had been engaged in industrial action since 20 September 2011. This industrial action included work stoppages and bans on the performance of overtime.

In response to further industrial action by employees, on 29 October 2011 Qantas gave notice of its intention to take employer response action in the form of a lock out and, in preparation for this action, immediately grounded its domestic and international fleets worldwide. The lock out was to take effect from 8pm on Monday 31 October. It was Qantas' intention that the lock out would remain in effect until the three unions abandoned a number of claims, particularly relating to proposed job security and site rates.

Application to terminate industrial action

Section 424(1)(d) of the Fair Work Act 2009 (Cth) provides that if protected industrial action is causing "significant damage" to the Australian economy or an important part of it, FWA must suspend or terminate the industrial action.

The Federal Minister made an application pursuant to section 424(1)(d) to terminate or, in the alternate, suspend all protected industrial action for a period of 120 days or more. The Minister's application was also supported by the Queensland Minister for Education and Industrial Relations.

Qantas and the Victorian and New South Wales Ministers' sought the termination of the protected industrial action. The AIPA, the TWU and the ALAEA argued for a suspension of industrial action (for a period of 90 days or more).

No party supported a suspension of all industrial action on an interim or short term basis.

"Significant damage" to the Australian economy

Qantas contended that the union's claims threatened the airline's commercial viability. Qantas provided evidence indicating that the protected action engaged in by the unions prior to 29 October 2011 had

affected 70,000 passengers, led to the cancellation of 600 flights and grounding of seven aircraft, and cost $70 million in damages. With regard to its own proposed lock out, Qantas led evidence showing that the cost to it alone would be approximately $20 million per day.

The Federal Minister tendered unchallenged evidence as to the significance of airline passenger and cargo transport to the Australian economy and the impact that a grounding of the Qantas fleet would have on the aviation and tourism industries.

Findings

The Full Bench found that it was unlikely that the protected industrial action taken by the AIPA, the ALAEA and the TWU was threatening to cause significant damage to the tourism and air transport industries.

However, the Full Bench did find that Qantas' proposed action, if taken, threatened to cause significant damage to the tourism and air transport industries, and indirectly to industry generally because of the effect on consumers of air passenger and cargo services. It was on this basis that the Full Bench found that the requirements set out in section 424(1) had been made out with respect to Qantas' proposed lock out.

The next issue that the Full Bench had to consider was whether it should terminate or suspend the protected industrial action. In addressing this issue the Full Bench acknowledged the need to ensure that protected industrial action is and remains admissible to parties involved in enterprise bargaining. The Full Bench also noted that there was still a prospect that a negotiated resolution would be reached between the parties in relation to the three proposed enterprise agreements.

The primary consideration under section 424(1) is the effect of the protected industrial action on the wider aviation and tourism industries. The Full Bench decided to immediately terminate industrial action in relation to each of the proposed enterprise agreements. Based on evidence which demonstrated that the aviation industry was vulnerable to uncertainty, it was held that a suspension of industrial action would not provide sufficient protection against the risk of significant damage to the tourism and aviation industries as it left open the possibility for further lock outs.

On this basis, the Full Bench immediately terminated all protected industrial action in relation to each of the proposed enterprise agreements. The parties were provided with 21 days (which could have been further extended) for further negotiations.

Postscript

Qantas, the AIPA, the ALAEA and the TWU were unable to reach agreements in the 21 day negotiation period. The disputes between Qantas and these unions will now be resolved by FWA through arbitration. Hearings have been listed for early to mid-2012.

Nick Ogilvie, Partner, and Francesco Baldo, Solicitor, Freehills

***Aircraft Technicians of Australia Pty Ltd v St Clair & Ors [*2012] HCASL 17 (9 February 2012)**

As reported in Volume 58 of *Aviation Briefs,*in 2011 the Court of Appeal of the Supreme Court of Queensland dismissed the appeal by Aircraft Technicians of Australia Pty Ltd ("ATA") against trial Court's decision in which the plaintiff, St Clair, was awarded $1,729,566 for personal injuries he had sustained in an aircraft accident. The Court of Appeal also increased the assessed damages to $2,313,846.

ATA applied to the High Court of Australia for special leave to appeal the Court of Appeal's judgment against both the Court of Appeal's decision on the applicant's liability and its assessment of damages.

On 9 February 2012, by Special Leave Dispositions, Justices Hayne and Crennan dismissed ATA's application stating the matters raised in respect of liability and damages are both questions of liability and damages, were factual and that an appeal to the High Court would raise no question of

principle suitable to a grant of special leave: "*It is not in the interests of justice generally, or in this particular case, that there be a grant of special leave*."

Editors.

Helicopter Services Cairns Pty Ltd v GBRH Holdings Pty Ltd **[2011] QDC 269 (17 November 2011)**

This proceeding before the District Court of Queensland relates to a dispute between Helicopter Services Cairns Pty Ltd (the "Applicant") and GBRH Holdings Pty Ltd ("the Respondent"), over which party was entitled to indemnity under the aircraft insurance policy with Allianz Australia Insurance Limited ("the Policy") relating to a Bell Jetranger 206B III helicopter ("the Aircraft") which was destroyed on 1 June 2011.

Background

On 16 August 2011, the Applicant, being the owner of the Aircraft, and the Respondent, entered into a Put and Call Option and Cross Hire Agreement ("the Agreement"), pursuant to which:

(a) the Respondent entered into the Policy with Allianz;

(b) the Applicant granted the Respondent an option to purchase the Aircraft;

(c) the Respondent granted the Applicant an option to sell the Aircraft;

(d) the Applicant was entitled to sell the Aircraft to a third party subject to offering the Respondent a right of first refusal;

(e) Until either option was exercised or there was a sale to a third party, the Applicant agreed to hire the Aircraft the Respondent for a fixed monthly fee of $8,057.00 being equal to the loan repayments (including interest) payable by the Applicant to the Commonwealth Bank of Australia in respect of the registered mortgage held by the Bank over the Aircraft ("the Mortgage");

(f) In the event of the sale of the Aircraft to any party, the Applicant was obliged to repay the Respondent the difference between the amount then owing under the Mortgage and the initial debt of $442,864.00 which, as at 1 June 2011, was in the sum of $56,820.72.

At the time of the loss of the Aircraft, no call or put option had been exercised.

Everson DCJ extracted the following provisions from the Agreement as significant to the matters in issue:

1(6) "*Subject to the terms of this Agreement, no interest in the Aircraft shall be vested in or transferred to the (respondent) until either the call option or the put option has been exercised. Each option granted pursuant to this Agreement is to be construed and interpreted as an irrevocable offer made by one party to the other*.;"

12(1) "*Throughout the period of hiring, the (respondent) shall have exclusive use of the Aircraft and be entitled to use the Aircraft for its own commercial purposes, charter and air work subject to the terms and conditions of this Agreement*."

13(4) "*The (respondent) shall be responsible for all risks of or in connection with the operation of the Aircraft by the (respondent), including risks of third party damage to persons or property and risks of liability towards persons who or whose property may be carried on the Aircraft during the hiring and the (respondent) undertakes to indemnify, release and hold harmless the (applicant) against all actions, claims, demands and liability howsoever arising (whether direct or indirect and irrespective of jurisdiction) from such risks and to cover the same adequately by an insurance or insurances with industry approved insurers with the (applicant's) interest noted, and will maintain such insurance or insurances throughout the period of hiring. Upon request, the (respondent) shall provide to the (applicant) evidence of the currency of any such insurance or insurances*."

Under the Policy, which included other aircraft and commenced on 16 August 2010

for a period of one year, the Aircraft was insured to an agreed value of $650,000.00, with the Applicant, Respondent and other parties named as insured parties. DCJ Everson stated that Policy was 'a composite policy' and therefore there was a need 'to determine what indemnifiable loss, if any' that was sustained by the parties as a consequence of the loss of the helicopter.

The Claim

The Respondent claimed $525,000 compensation under the insurance policy (the purchase price less an adjustment in the sum of $56,820.72 being the difference between the amount owing on the mortgage and the initial debt) for the loss of its right to call for the purchase of the helicopter pursuant to the Agreement. DCJ Everson noted that the difficulty with this submission was that at the date of its destruction the helicopter remained the property of the applicant, no interest in it having been transferred to the respondent by virtue of clause 1(6).

His Honour concluded that under the Agreement the Respondent was not entitled to indemnity in respect of the loss of the helicopter itself where it was not the owner of it at the relevant time.

"Any adjustments as to the purchase price, should the respondent exercise its option under the terms of the agreement, were contingent and did not confer upon the respondent an interest in the helicopter which corresponded to an entitlement to be indemnified under the terms of the insurance policy in the event the helicopter was destroyed while the agreement was in force."

The Applicant claimed the deductible pursuant to the insurance policy clause 13(4), a sum of $16,250.00 from the Respondent, as the Respondent had undertaken to indemnify the Applicant against "all actions, claims, demands and liability howsoever arising". The applicant submitted that this extended to the liability to pay the deductible in respect of the claim on the insurance policy. On this argument DCJ Everson said that there was no evidence presented to suggest that the presence of the deductible meant that the above risks were not adequately covered by the insurance policy.

The Applicant also claimed interest on the net proceeds of the insurance policy. DCJ Everson concluded that '[i]n all the circumstances it [had] not been demonstrated … that the applicant should be entitled to interest on the sum of $247,706.72 over and above that which is accruing pursuant to the arrangement between the parties.'

Conclusion

His Honour determined that the Applicant was the owner of the helicopter at the time of its destruction and ruled that the Respondent had not suffered an indemnifiable loss pursuant to the terms of the Policy merely upon the destruction of the helicopter. On that basis, the Applicant was entitled to sole indemnity under the Policy and was entitled to receive $247,706.72 being the net proceeds of the Policy, together with interest earned.

Editors.

Newton v Network Aviation Pty Ltd [2012] WADC 18 (6 February 2012)

This interlocutory application before the District Court of Western Australia related to alleged personal injuries sustained by the plaintiff, Walter Newton on a flight operated by the Defendant, Network Aviation Pty Ltd between Perth and Woodie Mine Site in Western Australia on 18 September 2007.

The Defendant applied for summary judgment based on the submission that the plaintiff's cause of action was extinguished under section 34 of the *Civil Aviation (Carriers' Liability) Act 1959* (the "**Commonwealth Act**") as applied pursuant to the Civil Aviation (Carriers' Liability) Act 1961 (the "**WA Act**")) because he failed to commenced the "*action*" within 2 years of the alleged incident.

The alleged "accident"

The Plaintiff, who is 1.96 metres tall, alleged that:

1. upon board the aircraft he was directed to sit in a seat with insufficient legal which required him to sit in an awkward and uncomfortable position.

2. the flight crew were unable to re-seat him until the aircraft was airborne; and

3. as a consequence of sitting in an award position for about 30 minutes, "external stress" was place on his lower spine and he developed severe pain in his lower back and buttock.

The Plaintiff further alleged that these events gave rise to "*an accident*" for the purpose of section 28 of the Commonwealth Act as applied pursuant section 6 of the WA Act.

Procedural history

The Plaintiff filed a writ of summons ("the **Writ**") on 11 September 2009, a week short of two years after the subject flight.

The Plaintiff did not serve the Writ on the Defendant until 10 September 2010. The Plaintiff filed a Statement of Claim on 5 October 2010 and the Defendant filed its defence on 25 October 2010.

Following the completion of certain interlocutory steps including exchange of discoverable documents and the service of the medical reports, on 1 July 2011 the Defendant commenced a conferral process with the Plaintiff in which the Defendant foreshadowed its intention to apply for summary judgment on the basis that the Plaintiff's action has extinguished because the Statement of Claim was filed more than 2 year after the alleged cause of action arose and that the filing of the Writ did not crystalize Newton's rights under section 34 of the Commonwealth Act.

Summary judgment application

The Defendant was required to seek leave of the Court to make its summary judgment because its application well exceeded the period set under the Rules of the Supreme Court of Western Australia ("the **Court Rules**"). The Court inferred that it was not until the Defendant received advice on the merits of the Plaintiff's action from senior counsel on 6 June 2011, that it was enlivened to the possibility that the Plaintiff's cause of action had been extinguished. Scott DCJ considered that there was "*force*" in the Defendant's argument that whilst the parties may have incurred costs to time of application for summary relief, determining this application may in turn save costs which would be unnecessarily incurred by both parties should the matter proceed to a final hearing. On the basis of that submission, the Court determined the merits of the Defendant's application as part of the consideration of whether leave should be granted or not.

Submissions

The Defendant submitted that there was "*no real question to be tried*" (as per *Fancourt v Mercantile Credits Ltd*[1] because:

[1] (1983) 154 CLR 87 at 99)

(a) any right to damages which the Plaintiff may have had against the Defendant was extinguished on 18 September 2009 because the indorsement of claim on the Writ (which was filed within the two year period) was entirely insufficient to constitute an action being brought against the defendant pursuant to s 34 of the Commonwealth Act; and/or

(b) the Plaintiff did not suffer his alleged injury as a result of an 'accident' within the meaning of that term in s 28 of the Commonwealth Act.

In response, the Plaintiff submitted that:

(a) the action was brought by the indorsed writ pursuant to s 34 of the Commonwealth Act;

(b) alternatively the Defendant has waived its right to maintain that the action was not brought or is estopped from doing so;

(c) the Defendant's alleged injury resulted from an accident within the meaning of that term in s 28 of the Commonwealth Act.

Findings

The key consideration for the Court was whether or not the Writ as indorsed by the Plaintiff was sufficient to be considered an "*action brought*" under section 34 of the Commonwealth Act. Scott DCJ noted that "*action brought*" was neither defined under the Commonwealth Act nor the relevant international conventions. His Honour turned to the High Court's determination in *Agtrack v Hatfield*[2] and *Air Link v Paterson*[3] [at 39]

- *"[…] The court needs to consider the character of the 'action' brought. That is whether the 'action' brought identified the claims essential pursuant to s 34 of the Commonwealth Act."*

- *"In the event that, having regard to these principles, an action is not brought within the relevant period of two years then the pre-requisite to bringing the action has not come into effect and the action is extinguished. If the rights are extinguished they cannot be revived by the purported application to them of state law. Any such law would subvert the applicable federal law effecting the extinguishment. The provisions of s 79 of the Judiciary Act 1903 (Cth) will not then 'pick up' any rules of pleading in the State court to enable any amendment to the initiating process so as to 'reinstate' the right of action."*

- *"In the event that action has been brought within the State court within the meaning of s 34 of the Commonwealth Act then s 79 of the Judiciary Act will enable an amendment to any pleadings within the scope of the State court's rules".*

Order 6 Rule 1 of the Court Rules stipulates that "*before a writ is issued it must be indorsed with a concise statement of the nature of the claim made, and of the relief or remedy required in the action*." In this matter, the indorsement on the Writ filed by the Plaintiff provided:

> "*The plaintiff claims damages for personal injury, loss and damage which he sustained on or about 18 September 2007 as a result of the negligence and/or breach of contract and/or breach of statutory duty of the defendant.*"

The Plaintiff gave no indication in the Writ that he was a passenger on the Defendant's aircraft when the alleged personal injury was sustained. These matters proved to be fatal to his claim.

Scott DCJ observed that a similar situation arose before Master Sanderson in *Samways v Ansett Australia Ltd*[4] in which the master dismissed the defendant's summary judgment application and granted the plaintiff leave to amend the indorsement on the writ. However, His Honour indicated that he was not bound nor in agreement with the *Samways* decision which in any event predated the *Airlink* and *Agtrack* High Court decisions.

[2] (2005) 223 CLR 251
[3] (2005) 223 CLR 283
[4] [2001] WASC 140

His Honour found that having regard to the Commonwealth Act and the Court Rules, the Plaintiff failed to define the "character of the action" by not specifying that he was a "*passenger on an aircraft operated by the defendant and that he had* [allegedly] *suffered personal injury on board the aircraft resulting from an accident*" (at [58]). Thus, no action had been brought by the Plaintiff within the two years specified by section 34.

The Court (at [88]) also denied the Plaintiff's submission that the Defendant's waived its entitlement to assert that an action was not brought by the Plaintiff pursuant to section 34 of the comment with Act or by way of issue estoppel.

"Accident"

"*For sake of completeness*" that Court felt compelled to consider whether the Plaintiff's alleged injuries resulted from an "*accident*" under section 28 of the Commonwealth Act, notwithstanding the determination that the Plaintiff had not brought an action under section 34 and that the Plaintiff had no relief under estoppel.

Scott DCJ turned to the High Court decision of *Povey v Qantas Airways Limited*[5] which adopted the meaning of "accident" from Air *France v Saks*[6], namely:

> *"... liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger."*

The key question then was whether the flight attendant's refusal to reseat the Plaintiff to a seat with more leg room was an "*unexpected or unusual event*". The Court considered that, subject to industry standard and the defendant's policy", the Plaintiff may have a serious question to be tried on the basis of the principals in *Olympic Airways v Husain*,[7] in which the US Supreme Court found that the death of a passenger which was caused by exposure to cigarette smoke was "*external*" to the passengers because the flight attendant refused to reseat the passenger away from smoke when requested. His Honour noted that neither party in Povey sought to challenge the correctness of *Husain*, the rationale of which has yet to be tested in Australia.

Final comments

Scott DCJ considered no further authorities on this point nor that Husain has been the subject of both judicial and academic criticism.[8] Professor Dempsey has highlighted that Justice Scalia, who was in dissent in *Husain*, "*pointed to appellate court decisions in Australia and the United Kingdom which held that inaction could not be an "event", but was instead a "non-event", and therefore not an accident under Article 17.*"[9] The relevant Australian decision was Povey which at that stage had yet to reach the High Court. Dempsey opined that:

> "*Instead of asking whether the inaction of a flight attendant was an "unusual or unexpected event of happening external to the passenger", the Court instead should have asked whether the flight attendant's inaction was an "accident." Imagine you are on a flight, and you ask a flight attendant to reseat you, and she refuses. Would you return to your seat and explain to your traveling companion, "I have just had an accident!"? Your companion would think you daft. Now suppose instead you told your traveling companion, "I have just had an unusual or expected event or happening." Now you just appear a bit odd rather than completely daft."* [10]

It is the author's view that should the Plaintiff appeal this decision and the Defendant in turn cross-appeals this point, it should ultimately be found that the case of *Husain* is distinguishable from the events alleged by the Plaintiff and that the flight

[5] (2005) 223 CLR 189
[6] [1984] USSC 45
[7] [2004] USSC 15.

[8] See for example, Ann Cornett, "Air Carrier Liability under Warsaw: The Ninth Circuit Holds That an Aircraft Personnel's Failure to Act in the Face of a Known Risk Is an "Accident" When Determining Warsaw Liability- Husain v. Olympic Airways, 68 J. AIR L. & COM. 163, 163 (Winter 2003).
[9] Paul Stephen Dempsey, "*Accidents and Injuries in International Aviation: Clash of the Titans*", Annals of Air and Space Law: Vol. XXXIV (2009). Accessed at http://www.mcgill.ca/files/iasl/Titans.pdf. At page
[10] Ibid.

attendant's reseating of the Plaintiff only after takeoff was not an "*accident*".

A further distinguishable case is the Supreme Court of Victoria decision of *Krum v Malaysian Airline System Berhad*[11] and the subsequent decision of Court of Appeal of the Supreme Court of Victoria[12] which were both overlooked by Scott DCJ. In *Krum* the passenger aggravated a pre-existing back injury after sleeping in an awkward position on a defective seat; he had brought the issue of the defective seat to the flight attendant's attention but the flight attendant did not move the passenger to a functioning seat. There was no suggestion in this case that the seat was defective.

Editors.

***Snook v Civil Aviation Safety Authority* (FCA) (11 November, 2011)**

The matter was heard by Tracey J of the Federal Court in Victoria on appeal from a decision of the Administrative Appeals Tribunal.

Procedural Background

Mr Snook held a private pilot's license and a maintenance engineer's licence. He was also certified to carry out maintenance on particular classes of aircraft.

After investigating incidents involving Mr Snook, CASA suspended Snook's private pilot's licence for a period of six months, subject to his successfully passing a flight test. Some months later it also cancelled Mr Snook's maintenance engineer licence and his certificate of approval.

Snook first appealed to the Administrative Appeals Tribunal ("the **Tribunal**") against these decisions under s 31(2) of the Act and s 25 of the Administrative Appeals Tribunal Act 1975 (Cth) ("the **AAT Act**"). The AAT set aside the delegate's decision to suspend Mr Snook's private pilot licence but decided to cancel the licence. The Tribunal affirmed the delegate's decisions to cancel Mr Snook's maintenance engineer licence and certificate of approval.

Snook now appealed against the Tribunal's decisions pursuant to s 44 of the AAT Act.

Background

The first matter of contention was the operation and maintenance of an aircraft, VH-YOG ["YOG"]. Its pilot noticed smoke in the cockpit shortly after it had taken off from Bunbury airport on 15 January 2008. The pilot safely landed the aircraft in a nearby paddock.

When Mr Snook examined the aircraft in the paddock he discovered that it had a missing tailpipe. He flew the aircraft back to Bunbury airport. The smoke in the cabin was attributed to a burning carpet. It had started to smoke because, in the absence of the tailpipe, hot air from the exhaust was coming into contact with the underside of the aircraft. However, Snook failed to enter the defect on a document known as a "*maintenance release*". If he had done so, the aircraft could not have been flown until the defect was rectified.

Previously, in conducting a routine 100 hourly inspection in December 2007 Snook had noticed cracks in the muffler and attempted a repair. He then re-attached the muffler in a manner that did not comply with the requirements of the relevant illustrated parts catalogue. The AAT found that the faulty attachment of the muffler contributed to the incident on the 15th January 2008. The AAT also found that Snook, as an aircraft maintenance engineer had failed to comply with a number of regulations. These included:

i. working on an engine on which his licence did not authorize him to work;

ii. failing to carry out some inspections as required by the aircraft manufacturer's service bulletins;

iii. failing to comply with air worthiness directives; and,

[11] [2004] VSC 185
[12] Malaysian Airline Systems Berhad v Krum [2005] VSCA 232.

iv. unlawfully issuing maintenance releases.

The Applicable Law

The relevant law included sections 3A, 8, 9 and 98 of the *Civil Aviation Act 1988* (Cth) ("the **Act**"). Its section 9A(1) provides that "[i]*n exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration*." Under reg 269 of the *Civil Aviation Regulations 1988* (Cth) ("the **Regulations**") CASA possess the power to cancel, vary or suspend licenses if the holder of the certificate or authority has failed in his or her duty with respect to any matter affecting the safe navigation or operation of an aircraft. Additionally, if "they are not a fit and proper person to have the responsibilities and exercise and perform the functions and duties of a holder of such a licence or certificate or an authority" CASA may also cancel, vary or suspend.

The AAT Decision

The Tribunal acted under sub-reg 269(1) (c) and (d) in cancelling Snook's private pilot licence. It found that Snook "failed in his duty with respect to a number of matters affecting the safe navigation or operation of an aircraft" including failing to appreciate that YOG was un airworthy at the time he flew it back to Bunbury and failing to comply with the defect reporting provisions of the Regulations. The Tribunal held that although Snook had identified this problem when conducting the daily inspection, his subsequent actions constituted a breach of his duty. In paragraph 84 of their decision the Tribunal observed that Snook, by taking off in an aircraft which was unserviceable, must have known that he would experience smoke in the cockpit. As his breaches were "*extremely serious*" the Tribunal concluded that they should "attract the cancellation of his private pilot's licence." Relying on the reasons of Toohey and Gaudron JJ in *Australian Broadcasting Tribunal v Bond*[13] they concluded that Snook was not a 'fit and proper person' to hold the licence. On the maintenance and engineer licence the Tribunal said that "*Snook's conduct of maintenance and his understanding of the regulatory requirements* [were] *seriously substandard*."

Arguments on Appeal

Mr Snook relied on three grounds. First, he contended that the Tribunal, in deciding on his fitness to hold a private pilot's licence had taken into account irrelevant considerations, namely his knowledge and skill as a licensed Aircraft Maintenance Engineer so as to place a higher standard upon him as a pilot. Second, in deciding upon his fitness to hold an Aircraft Maintenance Engineers license, it failed to consider the requirement for the applicant to work under the supervision of a Certificate of Approval holder. Third, in receiving supervision from a Certificate of Approval Holder the duty to ensure the legibility and/or accuracy of records in respect of maintenance carried out fell upon the supervisor not the applicant. For each of these grounds the applicant contended that the Tribunal's errors had the effect of imposing upon him a higher standard than that which is legally required for him to have the responsibilities and exercise and perform the functions and duties of a holder of the licences at issue.

Judgment of the Court

The Court referred to the wording of section 44 of the AAT Act and the words of Ryan J in *Australian Telecommunications Corporation v Lambroglou*[14] where his Honour said that "[i]*f the question, properly analysed, is not a question of law no amount of formulary like 'erred in law' or 'was open as a matter of law' can make it into a question of law*." Tracey J felt that the allegations that the Tribunal took into account irrelevant considerations and/or failed to take into account relevant considerations were grounds which, if made out, would warrant the intervention of the Court in judicial review proceedings under s 39B of the *Judiciary Act 1903* (Cth). His Honour was prepared to treat the appeal as if it were an application for judicial review.

[13] (1990) 170 CLR 321 at 380

[14] (1990) 12 AAR 515 at 527

In application to the appeal grounds Tracey J noted that the Tribunal, under reg 269(1)(d), would err 'if he or she were to hold a licence or certificate holder to account for dereliction of a duty which did not fall on the holder of such a licence or certificate." In respect to the pilot's licence Tracey J rejected the appellant's arguments, in particular as they related to the duties of the pilot. It was noted that there was an obligation to undertake a pre-flight inspection on the aircraft in the paddock. This in His Honour's view gave rise to an obligation under reg 50(2) to endorse the maintenance release document of YOG because it had suffered major damage. This was not done and therefore the pilot was not entitled to fly YOG. Consequently, Snook's flying of the aircraft breached his duties as a pilot. Under a "fair reading" of the Tribunal's decision His Honour concluded that the Tribunal's decision was based on the applicant's failure to comply with obligations under the Regulations and he was not held to a higher standard by the Tribunal.

In respect of the aircraft maintenance licence and the certificate of approval His Honour noted the applicant's reliance on sections of the Tribunal's reasons to assert that "Mr Snook's shortcomings as an aircraft maintenance engineer had been assessed at the highest standard which … was applicable to the holder of a certificate of approval." Tracey J, however, felt that the Tribunal had provided a lengthy analysis of this issue and that it had, in doing so, "made a clear distinction between Mr Snook's responsibilities as a holder of a certificate and an aircraft maintenance licence." Having determined to cancel Snook's certificate and licence under reg 269(1)(c), the Tribunal considered that the same action was warranted pursuant to reg 269(1)(d). In conclusion His Honour at paragraph 58 observed that:

Given that the requirements, imposed on the holders of both licences and certificates under the Regulations, were imposed to further the objects of the Act, it is hardly surprising that the same conduct which jeopardised or had the potential to jeopardise air safety might, in some instances, fall for consideration when Mr Snook's suitability to hold both his licence and certificate were being assessed under regs 269(1)(c) and (d).

Tracey J found no reviewable error and dismissed the appeal with costs.

Editors.

United Airlines Inc. v Sercel Australia Pty Limited [2012] NSWCA 24

Does a two-year Warsaw Convention time bar apply to a workers' compensation indemnity claim?

In the recent case of *United Airlines Inc. v Sercel Australia Pty Limited* [2012] NSWCA 24, the New South Wales Court of Appeal considered whether the two-year time limit imposed by Article 29 of the Warsaw Convention applied to a claim made by an employer for indemnity from the responsible airline in relation to workers' compensation payments.

Background facts

In September 2005, Sandeep Arora, an employee of Sercel Australia Pty Limited, sustained an injury to his head, neck and knee when the United Airlines aircraft on which he was travelling braked heavily following landing. Sercel made workers' compensation payments under the *Workers' Compensation Act 1987* (NSW) (NSW Act) and then sought compensation from United Airlines under section 151Z(1) of the NSW Act. That section provides:

> *"1 If the injury for which compensation is payable under this Act was caused under circumstances creating a liability in some person other than the worker's employer to pay damages in respect of the injury, the following provisions have effect:*
>
> *...*
>
> *(d) If the worker has recovered compensation under this Act, the person by whom the compensation was paid is entitled to be indemnified by the person so liable to pay those damages (being an*

indemnity limited to the amount of those damages)."

Arora brought no claim against United Airlines and the airline submitted that Sercel's claim for indemnity was out of time, not having been brought within two years.

The primary Judge Robison DCJ rejected that contention.

Court of Appeal

In the leading judgment of Allsop P, there is a detailed analysis of the governing legislation and a history of the implementation of the Warsaw Convention and its various amendments.

Section 37 of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth), (**Carriers' Liability Act**), which Act gives the Warsaw Convention, the Hague Protocol and Montreal Protocol No. 4 (together the Convention) force of law in Australia, provides:

"Nothing in (Part IIIC and the Convention) shall be deemed to exclude any liability of a carrier:

(a) to indemnify an employer of a passenger or any other person in respect of any liability of, or payment made by, that employer or other person under a law... providing for compensation... in the nature of workers' compensation; or

(b) to pay contribution to a tort-feasor who is liable in respect of the death of, or injury to, the passenger;

But this section does not operate so as to increase the liability of a carrier in respect of a passenger beyond the amount fixed by or in accordance with this Part."

President Allsop noted the following points in reaching his conclusion that the two-year time limit under Article 29 of the Warsaw Convention was inapplicable to the claim for indemnity under section 37 of the Carriers' Liability Act:

- The action was one for an indemnity not for damages.
- The liability of the person for the damages is to be assessed at the time of the act or omission causing the compensable injury regardless of whether the proceedings were taken or taken within the time prescribed by any limitation period.
- The limitation period for the cause of action under section 151Z(1)(d) of the NSW Act is six years under that Act.
- It was irrelevant that the worker was outside New South Wales when the injury occurred as this does not prevent compensation being payable under the NSW Act.

Allsop P made a thorough analysis of both the English and the French texts of relevant parts of the Convention and also looked at the enactment history going back to the *Carriage by Air Act* of 1935, noting that that Act did not provide for the action contemplated by section 37 of the Carriers' Liability Act ie workers' compensation indemnity and contribution between tort-feasors.

In 1959, and subsequently, the Carriers' Liability Act has had a provision dealing with indemnity and contribution. While each Act has had a two-year time bar applicable in certain respects, Allsop P noted that:

"*Section 37 does not deal with an action for damages or liability for the injury or death of a passenger, though it does provide for liability of the carrier in respect of the injury to or death of the passenger. It deals with the liability to pay two types of payments (creating two co-relative rights of well known rights or entitlements) which might arise in respect of the death of or injury to a passenger - workers' compensation payments and contribution of another tort feasor who is also liable. Neither type of liability or right is for damages or for the primary liability, though as would have been understood in 1959, both are, or are likely to be conditioned on the existence of liability of the carrier to the passenger for injury or death."*

While Article 29 of the Warsaw Convention extinguished the 'right to damages', it was noted that:

> *"The right of indemnity does not accrue until payment of the compensation is made. This will always be later, and possibly years later. It would be an unexpected operation of a law (and one that would also be unjust and capricious) if a time bar provision could operate to extinguish the right to sue, before it arose."*

Accordingly Allsop P came to the conclusion that the right of indemnity in sections 14 and 37 of the Carriers' Liability Act was not subject to the two-year time bar in section 34 and Article 29.

His judgment was accepted by MacFarlane JA, who agreed with him and by Handley AJA who, like Allsop P, also noted that the conclusion was consistent with the decision of the Ontario High Court in *Connaught Laboratories Limited v Air Canada* [1978] 94 DLR (3rd) 586 and the recent decision by the Ninth Circuit in *Chubb Insurance Co v Menlo Worldwide Forwarding Inc* at 634F 3rd 1023, 1028 [2011], those decisions involving claims for indemnity between carriers.

Conclusions

The decision will be greeted with concern by airlines (who may have already considered certain claims to have been time barred that might now be open to be pursued), but will no doubt be gladly received by workers' compensation insurers and employers (who might have thought that the gate for indemnity had been shut some time ago).

It should also be noted that while the decision related to the Warsaw Convention with the Hague Protocol and Montreal Protocol no 4, the same outcome could be expected if carriage had been subject to the *Montreal Convention 1999*.

Andrew Tulloch, Partner, DLA Piper

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LEGISLATION UPDATE

Aviation Transport Security Amendment (Screening) Bill 2012

On 16 February 2012, the *Aviation Transport Security Amendment (Screening) Bill 2012* ("the **Bill**") was introduced into the Australian House of Representatives and read for a second time in the Australian House of Representatives. The Bill will support the introduction of body scanner technology at airports across Australia which was first conceptualized in the 1990 "cult classic" *Total Recall*.

In the second reading speech, the Minister for Infrastructure and Transport Anthony Albanese indicated that this proposed legislation comes in response to the incident on 25 December 2009 when a passenger attempted to bomb Northwest Airlines flight 253 en route from Amsterdam to Detroit. It may be recalled that the passenger in question successfully smuggled an improvised explosive device through aviation security screening and onto the aircraft without being detected. The device concealed inside the passenger's underwear, contained no metallic components and was carried through a walk-through metal detector without triggering any alarm.

Following this incident, on 9 February 2010 the Australian Government announced a $28.5 million package of measures designed to assist the aviation industry to introduce a range of optimal technologies, including body scanners, multiview X-ray machines, bottled liquid scanners and additional explosive trace detection units at international screening points.

The Explanatory Memorandum of the Bill, which proposes to amend the *Aviation Transport Security Act 2004* ("the **Act**"), provides the following key provisions:

"*1. states that a person is taken to consent to any screening procedure when that person is at a screening point and must receive clearance in order to board an aircraft or to enter an area or zone of a security controlled airport;*

2. takes provision for the Aviation Transport Security Regulations 2005 to deal with persons that must not pass through a screening point; and

3. lists, but does not limit, the types of equipment that may be used for aviation security screening purposes, including metal detection, explosive trace detection and active millimetre wave body scanning equipment. Where a body scanner is used for the screening of a person, the image produced of that person must only be a generic body image that is gender-neutral and from which the person cannot be identified."

Section 95A of the Act, which allows a person to choose a frisk search over another screening procedure, is proposed to be repealed to enable the introduction of a policy whereby a person who is selected to pass through a body scanner at an aviation screening point may not choose, or be offered, an alternative method of screening. Allowances will be made where there is a physical or medical reason that would prevent a person being screened by a body scanner.

Minister Albanese stated that the proposed new measures will bring Australia into line with countries such as the United States of America, Canada, the United Kingdom and the Netherlands.

Editors.

FOCUS ON THE UNITED STATES

Recent Litigation Affecting Aircraft Finance and the Aviation Industry

Airlines and aircraft lessors would be well advised in today's economic climate to remain attuned to litigation outcomes that may affect the traditional rules for aircraft financing. Courts have recently decided cases involving applicability of insurance clauses in lease agreements, interpretation of lease terms controlling parties' obligations, lessors' rights upon default, lease obligations following bankruptcy, and the enforceability of liquidated damages provisions in lease contracts.[15]

Insurance Clauses in Lease Agreements

When a lessee breaches a lease, interpretation of an insurance clause may prove key to the lessor's attempts to mitigate damages. In *Fleet Business Credit L.L.C. v. Global Aerospace Underwriting Managers, Ltd.*, 646 F. Supp. 2d 473, 475 (S.D.N.Y. 2009), the lessee, after filing for bankruptcy, intentionally removed component parts from the aircraft financed by the plaintiff lessors. Subsequently, the lessors submitted claims for the missing parts to the lessee's insurance broker. Although a plain reading of the lessee's insurance policy provided that intentional acts were not covered under the policy, the plaintiff lessors argued that although the lessee intentionally removed the parts, the removal was "accidental" in relation to the plaintiffs. The lessors also cited to the "*Airline Finance/Lease Contract Endorsement*" clause (also known as the AVN 67B or 67C Endorsement), providing that the coverage for each contract party under the policy would not be invalidated by any act or omission of any other person or party that results in a breach of the policy.

The district court rejected the lessors' argument, explaining that the scope of the policy's coverage was unambiguous and did not cover intentional acts. Thus, the interpretation and applicability of the "*Airline Finance/Lease Contract Endorsement*" clause was a secondary issue that would be relevant only to the lessors' attempt to recover their losses from the lessee's insurance policy if the policy's terms were ambiguous with respect to coverage of intentional damage. Accordingly, the court granted the insurance company's motion for summary judgment with respect to the component parts that were intentionally removed by the lessee's employees.

Interpretation of Lease Terms Controlling Parties' Obligations

Consistently and unambiguously defining contract terms in an aircraft lease such that there is little room for more than one legitimate interpretation remains an important issue. In *Wells Fargo Bank Northwest, N.A. v. US Airways, Inc*., No. 650500/09, 2011 WL 1107127, at *1, (N.Y. Sup. Ct. Mar. 21, 2011), the parties disagreed over the term "delivery" where the defendant was obligated to return the leased aircraft weighing the same "as at delivery." According to the plaintiff, the term referred to the weight of the aircraft at the beginning of the lease. However, the defendant claimed the definition of the term varied in the contract depending upon whether the term was capitalized, alleging that when the term was capitalized, it referred to delivery of the aircraft at the beginning of lease, but when the term was not capitalized, it referred to delivery from the manufacturer. After analyzing the lease agreements, the court noted that the agreements never referenced delivery from the manufacturer. Thus, the court concluded that "delivery" referred only to the beginning of the lease and granted plaintiff summary judgment on liability.

Similarly, in *Addison Express, L.L.C. v. Medway Air Ambulance, Inc*., No. Civ. 3:04-CV-1954-H, 2006 WL 1489385, at *1 (N.D. Tex. May 19, 2006), Addison Express ("ADEX"), the lessee, attempted to argue that a 24-month lease term required Medway, the lessor, to make "*twenty-four separate consecutive deliveries*" of the

[15] Our article focuses on cases addressing issues specific to aviation finance rather than cases addressing general principles of contract law.

aircraft.[16] Medway delivered the aircraft to ADEX in October 2003, and ADEX took possession of the aircraft at that time. The following summer, the United States Drug Enforcement Agency ("**DEA**") instructed Medway to cease all activity with regard to the aircraft. Though ADEX subsequently obtained a conditional release from the government, Medway notified ADEX that it was terminating the lease as a result of the seizure. ADEX filed suit, claiming that Medway had breached the lease contract by failing to make the required payments after the aircraft was seized. Medway argued that "*delivery*" failed after the aircraft was seized by the DEA. However, the court rejected Medway's argument, explaining that the lease required "*a single delivery of a single good*," and that ADEX fulfilled its delivery obligation when it delivered the aircraft to Medway in October 2003.

While consistently and unambiguously defining contract terms in an aircraft lease is important, *Addison Express v. Medway Air Ambulance* also illustrates that litigation may often be inevitable despite unambiguous lease terms. In addition to asserting that the lease required 24 separate deliveries, Medway also attempted to convince the court that its failure to insure the aircraft against government seizure did not constitute a breach of the lease contract and ultimately an act of default. Medway's president asserted that he interpreted a specific clause in the lease to make seizure insurance optional. The language at issue provided that in the event that the aircraft was seized and "*there exists no valid and collectible insurance under any insurance policy*," Medway would pay ADEX a lump sum in addition to any other damages or remedies available at law or in equity.[17] The court concluded that the language, rather than relieving Medway of its obligation to obtain insurance, "*expressly reserves ADEX's right to pursue legal remedies for breach, without excluding default for failure to buy insurance*."[18]

Lessors' Rights Upon Default

In *Canal Air, L.L.C. v. William B. McCardell*, No. 11-11081, 2011 U.S. Dist. LEXIS 123572 (E.D. Mich. Oct. 26, 2011), the defendants voluntarily relinquished their possession of the leased aircraft after defaulting on their payment obligations. Canal Air subsequently sold the aircraft and filed a lawsuit against defendants in order to recover the deficiency and attorneys' fees. Canal Air moved for summary judgment, but the defendants alleged that summary judgment was not appropriate because Canal Air failed to establish that disposal of the aircraft was "*commercially reasonable*" or that it provided defendants reasonable notice prior to the sale. The lease agreement provided that Canal Air could sell the aircraft with or without notice in the event of default. However, despite this unambiguous language, the court denied Canal Air's motion for summary judgment. The court explained that New York law provides that a debtor's rights to a commercially reasonable sale and notice prior to the sale cannot be waived prior to default. Thus, the language in the lease did not constitute a valid waiver of the defendants' statutory rights.

Two recent cases have illustrated that lawsuits seeking to pierce the corporate veil in an effort to find all liable parties after a lessee defaults may be unsuccessful unless the lessor asserts a claim of fraud. The cases also suggest that establishing the existence of fraudulent conduct, a fact-intensive issue, may be difficult. *In NetJets Aviation, Inc. v. Peter Sleiman Development Group, L.L.C.*, No. 3:10-cv-483-J-32MCR, 2011 U.S. Dist. LEXIS 114081, at *1 (M.D. Fla. June 13, 2011), plaintiffs operated a fractional ownership program that allowed multiple individuals or entities to co-lease aircraft. A corporation, J.Ward, purchased and leased fractional interests in two airplanes but failed to make the required payments. After receiving a judgment against J.Ward, the plaintiffs

[16] The Second Circuit Court of Appeals ultimately vacated the district court's opinion in Lone Star Air Partners, L.L.C. v. Delta Air Lines, Inc., noting that while both the bankruptcy court and the district court concluded that the relevant contract language was unambiguous, both courts disagreed about the meaning of the language. Thus, the court remanded the case to the bankruptcy court for an evidentiary hearing to determine the meaning of the contractual language at issue. In re Delta Air Lines, Inc., No. 08-2825-bk, 2009 WL 577588, at *3-4 (2d Cir. Mar. 5, 2009).

[17] Id.

[18] Charter Services, 711 F. Supp. 2d at 1309.

discovered, among other things, that Jennifer Ward was the sole shareholder of J.Ward; that one of the defendants lived with Jennifer Ward; that one of the defendants gave money to J.Ward without loan arrangements or agreements; and that the defendants used J.Ward to execute contracts with the plaintiffs in order to access and use aircraft without being liable for the services. Thus, the plaintiffs alleged that Jennifer Ward ran J.Ward for the benefit of the defendants and sought to pierce the corporate veil.

The defendants filed a motion to dismiss, alleging that plaintiffs had failed to establish that either defendant was an alter ego of J.Ward or that the corporate form was used fraudulently or for an improper purpose. The magistrate judge concluded that the defendants could be considered the alter ego of J.Ward even though they were not shareholders of J.Ward, but he concluded that the allegations regarding the defendants' interactions with J.Ward were insufficient to constitute fraudulent or improper conduct. Thus, the magistrate judge recommended that defendants' motion to dismiss be granted. However, after reviewing the facts, the district court judge concluded that it was premature to foreclose the possibility that the plaintiffs could establish that defendants' conduct constituted fraud and thus denied defendants' motion to dismiss.[19]

Similarly, in *Charter Services, Inc. v. DL Air, L.L.C.,* 711 F. Supp. 2d 1298, 1300 (S.D. Ala. 2010), three defendants, one of whom owned 100 percent interest in the lessee's company as well as significant shares of the other two defendant corporations, made most of the payments for the leased aircraft. Thus, the plaintiffs argued that the defendants should be liable for the lessee's breach of contract. In determining whether to pierce the corporate veil, the court analyzed the corporation's operations, but explained that the ultimate issue was whether the "*plaintiffs presented substantial evidence of the existence of fraud or inequity in the use of the corporate form*."[20]

The court also noted that the "*fraud or injustice must be more than the breach of contract*."[21] Thus, the court refused to pierce the corporate veil and granted the defendants' motion for summary judgment because the plaintiffs' only evidence of fraudulent conduct related to the defendants' breach of contract.

Lease Obligations Following Bankruptcy

Airline bankruptcies continue to complicate the expectations of aircraft financiers. In *Bremer Bank, National Ass'n v. John Hancock Life Insurance Co*., No. Civ. 06-1534, 2009 WL 702009, at *1 (D. Minn. Mar. 13, 2009), aff'd, 601 F.3d 824 (8th Cir. 2010), the court upheld the foreclosure of the owner participant's equity share in a bankrupt airline as a result of a bankruptcy proceeding. The defendants gave instructions to the trustee to foreclose the plaintiff's equity share, and the plaintiff claimed that the lease agreement required defendants to exercise remedies against the bankrupt airline prior to exercising remedies against the plaintiff. However, the defendants asserted that they had in fact exercised remedies against the airline prior to foreclosure of plaintiff's equity share. Accordingly, the case turned in part on whether the parties intended that there be a difference between language providing for "steps leading up to the exercise of a remedy" and the "exercise of a remedy." The court, relying on *Lone Star Air Partners, L.L.C. v. Delta Air Lines, Inc.,* 387 B.R. 426 (S.D.N.Y. 2008),[22] declined to recognize a distinction between "*steps leading up to the exercise of a remedy*" and the "*exercise of a remedy*." Thus, the court held that the defendants followed the appropriate procedures prior to foreclosing on the plaintiff's equity interest.

In an earlier case, *In re Northwest Airlines Corp.,* 383 B.R. 575 (Bankr. S.D.N.Y. 2008), the court concluded that the lenders had not foreclosed on their security interest in the aircraft lease or its proceeds when they foreclosed on their security interest in the aircraft. Prior to bankruptcy, Northwest

[19] *NetJets Aviation, Inc. v. Peter Sleiman Development Group, L.L.C*., No. 3:10-cv-483-J-32MCR, 2011 U.S. Dist. LEXIS 109973, at *1 (M.D. Fla. Sept. 27, 2011).
[20] Id. at *10.
[21] Id. at *9.
[22] *Addison Express*, 2006 WL 1489385, at *3. ADEX essentially argued that the lease should be construed as an installment contract

had entered into a leveraged lease of an aircraft. Penta Aviation was the beneficiary of an "owner trust" created to hold title to the aircraft and to lease the aircraft to Northwest. The lenders provided Northwest with most of the purchase price for the aircraft in exchange for a first priority security interest in the aircraft and the lease.

After Northwest rejected the lease and abandoned the aircraft, the lenders sent the trustee of the owner trust, Penta, and Northwest an Acceleration Notice defining collateral as the aircraft and the aircraft lease. However, when the Notice of Public Foreclosure Sale was published, it did not reference the lease or a claim for damages for breach of the lease. The court rejected the lenders' argument that the lease was conveyed as a matter of law with the aircraft, explaining that, at the time of foreclosure, the lease did not encumber the aircraft because Northwest had previously rejected the lease. The lease merely represented "*a claim for damages against the lessee*."[23] Accordingly, the court held that the lenders had not "*obtained all right, title, and interest of the Owner to a damages claim against* [the airline],"[24] and that the owner was the proper party to assert a damages claim for the airline's breach of the aircraft lease.[25]

Enforceability of Liquidated Damages Provisions

In yet another bankruptcy case involving Northwest Airlines, In *re Northwest Airlines Corp.*, 393 B.R. 352 (Bankr. S.D.N.Y. 2008), the court, applying Minnesota law rather than the Uniform Commercial Code,[26] concluded that the liquidated damages clauses in two aircraft leases were unreasonable and thus unenforceable. The court explained that the liquidated damages clauses were unreasonable because the calculation of damages was based on a static stipulated loss value ("**SLV**") that did not allow for depreciation of the aircraft over time and did not account for the lessee's payment of rent over the course of the lease. Moreover, the court indicated that SLV, a liquidated damages provision common in aircraft leases, would have been an appropriate template for the calculation of liquidated damages if the SLV declined over the course of the lease term. Other courts have also enforced liquidated damages provisions that account for depreciation and rental payments.[27] Finally, addressing the lessor's argument that the court should consider the parties' sophistication when judging the reasonableness of the liquidated damages clause, the court noted that it is inappropriate to bind sophisticated parties to "patently unreasonable" liquidated damages provisions.

"Hell or Highwater" Clauses

As we have reported previously,[28] a key factor in ensuring that any lease is financeable is whether the lease contains a "hell or high water" clause, requiring that rental payments will be made regardless of the condition of the aircraft. Historically, courts have uniformly recognized this type of provision and have consistently upheld its enforceability. Two recent court decisions, however, have been divided on that presumption.

In *ACG Acquisition XX L.L.C. v. Olympic Airlines, S.A.* [2010] EWHC 923 (Comm), a U.K. court refused to grant summary judgment to the lessor, ACG Acquisition XX L.L.C. ("**ACG**"), in a claim for unpaid rent by the lessee Olympic Airlines, S.A. ("**Olympic**"). Olympic stopped paying rent on a leased aircraft when it determined that, after the aircraft lost its Certificate of Airworthiness, repairs exceeded the value of the aircraft. Notwithstanding a fairly standard "as is-where is" disclaimer and a

[23] In *re Northwest Airlines Corp*., 383 B.R. at 583.
[24] Id. at 582.
[25] The court noted that the lenders' security interest in the aircraft lease was not eliminated when they foreclosed on the aircraft, and that the lenders "may have a lien on the proceeds of the Owner's Claim." Id. at 584.
[26] Article 2A of the U.C.C. applies to any transaction that creates a lease, but the leases at issue in this case provided that Minnesota law governed all matters of construction, validity, and performance.
[27] See *Wells Fargo Bank Northwest, N.A. v. Taca Int'l Airlines, S.A*., 315 F. Supp. 2d 347, 349-50 (S.D.N.Y. 2003).
[28] See E. Evans and D. Reddy, "*The 'Hell or Highwater Clause': A Closer Look at its Legal Enforceability by Courts in the United Kingdom and New York*," Jones Day Airlines and Aviation Alert (Fall 2010). We repeat the discussion of these cases for completeness and because of their relevance to the area of aviation finance.

"hell or high water" clause in the applicable lease, the court refused ACG's summary judgment application and held that an aircraft suitable for immediate operation in commercial service had never been supplied.

In comparison, in *Jet Acceptance Corp. v. Quest Mexicana, S.A. de C.V.*, No. 602789/08, 2010 WL 2651641, at *1 (N.Y. Sup. Ct. June 23, 2010), the New York court produced a more financier-friendly result. Jet Acceptance Corp. ("**JAC**") and Quest Mexicana, S.A. de C.V. ("**Quest**") entered into four aircraft operating lease agreements. Each lease agreement included a "hell or high water" clause requiring Quest to pay rent and perform all of its other obligations under the lease notwithstanding any defense or other circumstance.

After accepting the first aircraft for delivery and acknowledging in an Acceptance Certificate that the aircraft was delivered to Quest "*as is-where is*," Quest failed to remove the aircraft from its location and made only two payments on the aircraft. Subsequently, JAC tendered the remaining three aircraft pursuant to the terms of the lease, but Quest failed to comply with the delivery procedures or to make the required rental payments after it was deemed to have accepted delivery of the aircraft. While Quest sought to avoid the "hell or high water" clauses, the court recognized that "hell or high water" provisions are commonly respected and enforced in equipment leases. Moreover, the court precluded the airline from raising the doctrine of unconscionability to preclude enforcement of the clauses.

On appeal, the appellate court affirmed the lower court's decision in 2011[29] but noted that JAC ultimately did not need to rely on the "*hell or high water*" provisions. The court explained that while the "*hell or high water*" provisions required Quest to perform its obligations under the leases even if there was a legitimate reason not to perform, Quest had failed to establish that it had a legitimate reason for refusing to perform its obligations. Furthermore, the appellate court agreed that the doctrine of unconscionability rarely applies in a commercial setting.

Conclusion

Skilled counsel will want to study these recent court decisions and implement "lessons learned" when drafting new leases and advising clients regarding future disputes. Airlines and financiers must make every effort to define contract terms in aircraft leases consistently and unambiguously. Moreover, lessors must also remember that they cannot draft around debtors' statutory rights. Finally, recent cases also illustrate the importance of considering how a lessee's bankruptcy will affect the lease. Awareness of the recent trends in aircraft finance litigation will enable airlines and financiers to better protect their interests when drafting lease agreements and better defend against lawsuits involving the enforceability of lease provisions.

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[29] *Jet Acceptance Corp. v. Quest Mexicana, S.A. de C.V.*, No. 5089, 602789/08, 2011 N.Y. App. Div. LEXIS 6272, at *1 (N.Y. App. Div. Sept. 1, 2011).

Lopez v. Jet Blue Airways No. 10-3550-cv (2d Cir. Dec. 1, 2011).

Application of Federal Statutes to Passenger Boarding and Deplaning Claims

The Second Circuit Court of Appeals recently held that no private right of action exists for a violation of the *Air Carrier Access Act of 1986* ("**ACAA**") and that Title III of the Americans with Disabilities Act of 1990 ("**ADA**") does not apply to disability services rendered by an air carrier in an airport terminal.

In *Lopez v. Jet Blue Airways*, the Court of Appeals upheld dismissal of a disabled passenger's claims under the ACAA and ADA, arising from the carrier's alleged failure to provide timely wheelchair assistance to help her board her flights.

Plaintiff Lopez, who suffers from reflex sympathetic dystrophy, filed an administrative complaint with the Department of Transportation ("**DOT**") against JetBlue alleging that its failure to provide her timely wheelchair assistance when boarding two JetBlue flights caused her pain, swelling and mental anguish. The carrier admitted that it was late in providing wheelchair access on one of Mrs. Lopez's flights, but not with respect to a second flight. The DOT took no action against JetBlue and Lopez filed suit against the carrier in New York federal court where its motion to dismiss the complaint on the grounds that neither the ACAA nor the ADA permitted Lopez to bring a private action was granted.

On appeal, the Second Circuit affirmed, finding that even though JetBlue had admitted to violating a provision of the ACAA, no private right of action – either express or implied – lies under the ACAA. The Court noted that although two sister circuits – the Fifth and Eight Circuits – had, relying on the statute's legislative history, found an implied private right of action under the ACAA, they did so prior to the Supreme Court's decision in Alexander v. Sandoval.[30]

In Sandoval, the U.S. Supreme Court found that when determining whether a statute contains an implied private right of action, a court should only consider the statute's legislative history to the extent that the history clarifies the text, which must demonstrate a clear congressional intent to create a private right of action. Otherwise, only the statute's text should be analyzed. Consistent with the Sandoval decision, the Tenth and Eleventh Circuits concluded that the text of the ACAA does not express congressional intent to create a private right of action and, accordingly, no private right of action should be implied.

The Second Circuit then addressed Lopez's claim under the ADA, which does explicitly provide for a private right of action. Although the ADA prohibits discrimination in places of public accommodation by private entities engaged in the business of transporting people, it also specifically carves out transportation by aircraft. Because of the aircraft exclusion, the Court determined that an airport terminal could not be considered a public place of accommodation under the ADA.

Spinard v. Comair, Inc.[31] involved a state law negligence claim for a disembarkation injury. Defendant Comair argued that the plaintiff's state law negligence claims were preempted by the *Federal Aviation Act of 1958* ("**FAA**") and the *Airline Deregulation Act of 1978*.

Plaintiff was onboard a Comair flight bound for Florida when a passenger became ill and the flight was diverted to Virginia. All passengers were deplaned via "integral airstairs" rather than by jetway or truck-mounted stairs which typically were used to exit the subject aircraft. Plaintiff fell at the bottom of the airstairs and sustained injuries. Plaintiff's state court action was removed by Comair to federal court, which then moved for summary judgment on preemption grounds.

[30] 532 U.S. 275 (2001)
[31] No. 1:09-cv-04111-JBW-LB (E.D.N.Y. Nov. 23, 2011)

The district court first addressed the FAA, which was enacted to create a uniform system of federal regulation of air safety for the safe and efficient use of the country's airspace. It found that the FAA did not preempt plaintiff's claim because her disembarkation did not implicate air safety. Specifically, the court relied on the Second Circuit's recent decision in *Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm'n,*[32] wherein the appellate court found that a local airport had to obtain a permit from a local municipal authority before removing trees from protected land because the FAA's preemption of the field of air safety did not implicate tree removal.

The court then addressed the *Airline Deregulation Act*, which was intended to maximize competitive market forces so as to further efficiency and innovation in air transportation services and lower prices. The Act prohibits states from enacting statues regulating airlines' prices, routes and services. The court concluded that the Act did not preempt plaintiff's claim because, even assuming that the preemption clause found in the Deregulation Act were applicable, plaintiff's claims were unrelated to Comair's routes, prices or services.

After deciding that plaintiff's claims were not preempted by either the FAA or the Airline Deregulation Act, the court denied Comair's motion for summary judgment on the ground that a question of fact existed as to whether safer means could have been provided for plaintiff's disembarkation.

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[32] 634 F.3d 206, 211 (2d Cir. 2011)

***In Re: Air Crash Near Clarence Center, New York, on February 12, 2009*, No. 1:09-md-02085-WMS (W.D.N.Y. Dec. 17, 2011),**

Wrongful Death Litigation Arising Out of the Continental Connection Flight 3407 Accident: A Federal Court Compels Plaintiff to Produce a Broad Array of Damages Discovery, Including Social Media

We are living in the midst of a social media revolution that is changing the way individuals, companies and governments organize, navigate and share information, as well as the very nature of privacy. As is becoming increasingly apparent, the information contained in a person's social media account can have a profound impact on the outcome of litigation. However, U.S. plaintiffs' counsel has consistently argued that defendants are not entitled to discovery of a decedent's or a claimant's social media accounts in a wrongful death lawsuit. Their position has been based, in part, on the fact that no reported U.S. decision has directly addressed the discoverability of social media in a wrongful death lawsuit. As a result of the December 17, 2011 decision by the U.S. District Court for the Western District of New York in *In Re: Air Crash Near Clarence Center, New York, on February 12, 2009,*[33] which finds that social media accounts are subject to discovery in these lawsuits, such an argument is increasingly untenable.

The decision involves the February 12, 2009 crash of Continental Connection Flight 3407, operated by Colgan Air, while on final approach to Buffalo Niagara International Airport, which killed all 49 people on board and one person on the ground. Plaintiff Xiaojun Pan commenced a wrongful death lawsuit on behalf of his wife, Shibin Yao, who was a passenger on Flight 3407, against Colgan, Pinnacle Airlines Corp. (Colgan's parent company) and Continental Airlines. (Bombardier, Inc., the manufacturer of the subject Q400 aircraft, is a defendant in a separate lawsuit commenced by Plaintiff Pan.)

[33] No. 1:09-md-02085-WMS (W.D.N.Y. Dec. 17, 2011)

The Court's decision arose from a dispute relating to the permissible scope of damages discovery in Plaintiff Pan's wrongful death lawsuit. Specifically, Defendants contended that Plaintiff had failed to produce records essential to Defendants' defense of the lawsuit and preparation for trial, including documents relating to the health and financial condition of the decedent and claimant family members, as well as the decedent's lost earnings, personal consumption and financial support of the claimants. The outstanding discovery also included information and documents necessary to determine the domicile of the decedent, who was a Chinese citizen residing in the United States on a secondment with PricewaterhouseCoopers, New York, at the time of the accident. The decedent's domicile is an important issue in the case because of its implications for the applicable compensatory damages law and, correspondingly, Plaintiff's recoverable damages.

Defendants filed a motion to compel proper discovery responses from Plaintiff Pan. In its decision, the Court ordered Plaintiff to produce a wide variety of discovery relevant to his damages claim, including the decedent's and the claimants' checking, bank, credit card, debit card, investment, medical and electronic communications records. Although it is beyond the scope of this Alert to address all aspects of this decision, we now address a particularly significant aspect of it, namely, the fact that the court ordered Plaintiff to produce the decedent's and the claimant's emails, social media accounts, text messages and instant messages.

In so ruling, the court rejected the Plaintiff's objection that the discovery request for these electronic communications sought irrelevant information, was barred by the *Stored Communications Act* (18 U.S.C. § 2701), constituted an invasion of privacy and was overly broad. The court stated that there could be "little doubt" that the information sought from these electronic communications, i.e., information relating to the decedent's domicile and her financial support of the claimants, was relevant.

Similarly, the court stated that the Stored Communications Act, which prohibits unauthorized access to stored electronic communications (see 18 U.S.C. §§ 2701-2712), does not prevent Plaintiff Pan, as the authorized representative of the decedent's estate with possession, control and authority over the decedent's property, from being able to secure responsive electronic communications. Moreover, the Court noted that the *Stored Communications Act* permits access to electronic communications taken in good faith pursuant to a court order.

In addition, the court rejected Plaintiff's argument that production of the decedent's electronic communications would be an invasion of her privacy. The court found that there is no common law right to privacy in New York and that any privacy interests generally cease upon death. The court also stated that Plaintiff has the option of producing the responsive electronic communications subject to a protective order regarding confidential information that has been issued in the Flight 3407 litigation.

While this decision provides additional legal support to defendants seeking discovery of social media generally and, in particular, in wrongful death lawsuits, the process by which a defendant obtains such discovery is often a complicated one. If you have any questions about this decision, its implications or the process by which one seeks to obtain social media, please contact:

David J. Harrington, Jonathan E. DeMay, & Evan Kwarta, Partners, Condon & Forsyth LLP

This article first appeared in Condon & Forsyth LLP's Client Alert published in December 2011 and has been reproduced with the kind permission of the authors.

FOCUS ON CANADA

Airia Brands Inc v Air Canada 2011 ONSC 6286

End of the line for air cargo surcharges class action

The air cargo surcharges class action has been winding its way through the Ontario courts. In the class action case of *Airia Brands Inc v Air Canada*, in late October 2011, the Ontario Superior Court of Justice certified, on consent, the claims against SAS, Qantas, Cargolux and Singapore Airlines, solely for the purpose of settlement. When certification is sought solely for this purpose, the court applies a much-less rigorous test for determining whether certification is appropriate.

As its contribution to the settlement, SAS agreed to pay C$300,000 for the benefit of class members. The court noted that SAS operated no flights into or out of Canada during the relevant period. Rather, its shipments between Canada and other countries were routed through the United States. The materials filed on the certification motion also indicated that a primary objective for class counsel in negotiating with SAS was ensuring the receipt of continued cooperation in the litigation. The amount paid was said to reflect "a significant portion of the fuel surcharges imposed" by SAS.

Qantas - which, along with SAS, was described as a minor participant in the Canadian air cargo market - agreed to pay C$237,000, the total fuel charges imposed by Qantas during the relevant period.

Cargolux, which pled guilty in Canada and settled its US litigation, agreed to pay C$1.8 million for the benefit of class members. It also agreed to provide substantial cooperation to the plaintiffs in the continued prosecution of the litigation. The court noted that this settlement was intended to be roughly proportional to the Cargolux settlement in the United States, plus a contribution to notice and administrative costs. Singapore Airlines, which has not pled guilty and has not settled its US litigation, agreed to pay C$1.05 million for the benefit of class members, of which up to C$250,000 is allocated towards Singapore Airlines' proportionate share of administration and notice costs, without refund should such costs be less. (In fact, its share of costs was C$47,000. The excess funds are to be distributed to the settlement class members.)

The court noted that Singapore's settlement roughly reflects the relative terms of the US Cargolux settlement, with accommodation for the fact that in Canada, Singapore was a "smaller defendant" and had a smaller volume of commerce relative to Cargolux during the class period. Singapore also agreed to cooperate in the prosecution of the litigation, but such cooperation will be "*delayed until after the delivery of the relevant documents or information in the US litigation*".

As was the case when Lufthansa agreed on settlement terms, SAS, Qantas, Cargolux and Singapore requested a bar order (which was not opposed by the class and the non-settling defendants) barring all claims for contribution and indemnity against these defendants (excluding claims made by persons who have opted out of the settlement).

According to the terms of the Lufthansa settlement, non-settling defendants were permitted, as of right, to require documentary and oral discovery of Lufthansa. In seeking approval of the present settlement, SAS, Cargolux and Singapore argued that the non-settling defendants should be required to obtain leave, by way of a motion made on notice to the settling defendants, before burdening them with discovery obligations. This would allow the settling defendants to challenge the right of the non-settling defendants to institute discovery in situations where the demands sought to be imposed on them might not be "proportionate" to their involvement in the chain of events leading to the litigation.

The court accepted this proviso, indicating that it represents a fair balancing of interests between the settling and non-

settling defendants. The requirement for this "balancing of interests" comes from the Ontario court's decision in Ontario New *Home Warranty v Chevron Chemical Co*[34] and is reflected in recent changes to the Rules of Civil Procedure.

On this point, Qantas argued that it should not be required to submit to discovery because it had not previously been part of the action and was added only in the certification motion for the purposes of facilitating settlement. Qantas also argued that its position was bolstered by the fact that its settlement was explicitly made on the basis that it did not admit any liability and that it had agreed to this resolution solely for the purpose of avoiding any further expense, inconvenience and litigation burden. By returning the full value of the fuel surcharges collected, it should be able to "put to rest this controversy". The court accepted Qantas's submission. Qantas was added as a party to the litigation; the class was certified as against SAS, Qantas, Cargolux and Singapore Airlines; the settlement was approved; and the bar order was imposed.

Carlos P Martins, Partner, Bersenas Jacobsen Chouest Thomson Blackburn LLP

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Postscript:

On 12 December 2011, a settlement agreement was reached with LAN Airlines S.A. and LAN Cargo S.A. (LAN) which agreed to pay $700,000.

On 16 July 2012, a settlement approval hearing is listed in respect of the settlements with Air France, KLM and LAN.

Editors.

[34] ([1999] OJ 2245 (SC).

Canada (Human Rights Commission) v. Canadian Transportation Agency 2011 FCA 332

End of the Line: Jurisdiction of the CTA

Eddy Morten, a profoundly deaf and blind passenger, filed a complaint against Air Canada because of its denial of his request to travel without a personal attendant. The complaint worked its way through two administrative tribunals, the Federal Court and most recently, the Federal Court of Appeal. In the most recent and probably final decision on the matter, the Federal Court of Appeal in essence restored the decision of the initial decision-maker, the Canadian Transportation Agency (the —Agency||). The Agency had dismissed Morten's complaint and found Air Canada's attendant policy did not constitute an undue obstacle to the mobility of a person with a disability.

Morten is profoundly deaf and has extreme visual disabilities. He has no light perception in his left eye and only extremely limited vision through the right. He also suffers from nystagmus, a condition that causes objects in his limited visual field to appear to move erratically and hinders balance and coordination.

In the summer of 2004, Air Canada decided that Morten would require an attendant to travel on one of its flights. Morten disagreed and filed a complaint with the Agency in February of 2005. The Agency upheld Air Canada's action on the basis that the carrier's decision was justified in light of its safety-related concerns. It was reasonable to conclude that Morten would require the assistance of an attendant in the event of an emergency evacuation or decompression.

Instead of seeking to appeal the Agency's decision, Morten filed the same complaint with the Canadian Human Rights Commission (the —Commission||) in the fall of 2005.

Air Canada brought a motion to the Canadian Human Rights Tribunal (the —Tribunal||) to have the Commission's

investigation stayed on the basis that the matter had already been dealt with by the Agency. The Tribunal disagreed, the investigation proceeded and the Commission subsequently referred the matter to the Tribunal for a full hearing on the merits of the complaint.

The Tribunal conducted an 11 day hearing in 2008. There were numerous witnesses including several experts. In January 2009, the Tribunal released its decision. It found that it had jurisdiction to consider the complaint, although the Agency had made a prior determination on the same set of facts. The Tribunal held that it was not possible to determine whether Morten should be allowed to travel unattended until Morten was provided the opportunity to have his individual level of self-reliance assessed fairly and accurately. To that end, Air Canada was ordered to develop an attendant policy in conjunction with the Commission and Morten. While the Tribunal purported not to order what that policy should provide, it essentially restrained any independent decision making by its expressed views of what could be done consistent with aviation safety regulations.

Air Canada brought an application to the Federal Court for judicial review of the Tribunal's decision. It argued that the Tribunal did not have—or alternatively ought not to have exercised-- jurisdiction to adjudicate. It also argued that the Tribunal committed several errors of law and misinterpreted the evidence. The Agency also brought an application for judicial review of the Tribunal decision, arguing that the Agency has exclusive jurisdiction to adjudicate disability related disputes which arise within the Canadian transportation network.

The Federal Court set aside the Tribunal decision on the basis that the Commission and Tribunal exceeded their jurisdiction in the present case. In light of its decision on jurisdiction, the Federal Court declined to review the merits of the decision.

The Commission appealed the Federal Court decision to the Federal Court of Appeal (FCA). On appeal, the Agency reiterated its position that it has exclusive jurisdiction over such transportation related complaints. It relied on the Supreme Court of Canada's decision in CCD v. Via Rail, which established that the Agency has a special role to play in applying its expertise to human rights complaints in the transportation context and that the relevant section of the Agency's enabling Act is essentially human rights legislation. Air Canada supported the Agency's position but argued that in the alternative, if it should be found that the Agency and the Tribunal have concurrent jurisdiction, then the Tribunal should have declined to hear the complaint which had been previously adjudicated. The decision should therefore be set aside on the basis of the common law finality doctrines, namely issue estoppel, abuse of process and collateral attack.

The FCA held that for the purpose of the appeal, it was sufficient to assume, without deciding, that the Tribunal did have concurrent jurisdiction with the Agency to deal with a complaint concerning discrimination within the federal transportation network. The FCA then applied the recent Supreme Court of Canada decision of British Columbia (Workers' Compensation Board) v. Figliola, a case that involved two administrative tribunals with concurrent jurisdiction over a com-plaint. In Figliola, the Supreme Court held that when a tribunal is considering a request that it not hear a proceeding because the subject matter of the proceeding has previously been the subject of adjudication by another tribunal, the tribunal should be guided less by precise doctrinal catechisms and more by the goals of fairness and finality in decision-making. The avoidance of re-litigation of issues already decided by a decision-maker with the authority to resolve them is to be given particular importance. Applying these principles to the Tribunal's decision in Morten, the FCA concluded that the Tribunal was complicit in an attempt to collaterally appeal the merits of the Agency's decision, and that the Tribunal improperly dismissed Air Canada's preliminary motion for a stay on technical grounds without considering the unfairness inherent in serial forum shopping. The FCA held that any concern about the Agency's application of human rights principles ought

to have been addressed through the appeal process for Agency decisions and noted that Air Canada advised Morten, after he had failed to file an application for leave to appeal in the time specified, that it would not seek to take advantage of this failure if Morten were to drop the Commission proceedings and seek appeal in the normal course.

It is important to note that CCD v. Via Rail was not about competing tribunals – in that case, the Supreme Court was not comparing the Agency's jurisdiction over a particular complaint to that of the Tribunal. The issue of whether the Agency and the Tribunal have concurrent jurisdiction over discrimination complaints in the transportation network has not yet been decided by an appellate court. As things now stand the only direct authority on the subject is from the Federal Court decision in Morten—a decision which upholds the exclusive jurisdiction of the Agency in relation to complaints concerning accessibility of the federal transportation network.

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Sabre Inc. v. International Air Transport Association, 2011 ONCA (CanLII) (30 November 2011).

In the January 2011 edition of Transportation Notes[35], Bersenas Jacobsen Chouest Thomson Blackburn LLP reported on the decision of the Ontario Superior Court of Justice in which it was held that IATA did not breach any confidentiality undertakings in marketing its PaxIS product. Sabre Inc., one of the world's major GDS and the party challenging IATA's right to market the PaxIS product, appealed that decision to the Ontario Court of Appeal.

The dispute centres around IATA's creation and marketing of PaxIS, a product designed for air carriers that compiles passenger booking data in a form that assists airlines with capacity/ route planning, marketing and sales. The PaxIS product includes —data analysis, calibration and market intelligence together with a web tool created for access to the PaxIS data and reports by IATA customers. The raw data for PaxIS is derived from information collected through the BSP process.

Sabre contends that PaxIS is based on information taken from the BSP system which was input into the system by Sabre (though its GDS function) — and that this information was entered into the BSP system on a confidential basis. It is noteworthy that PaxIS competes with Sabre's own product, MIDT.

The agreements governing the transmission of raw data entered into BSP database contain confidentiality clauses that flow only one way: Sabre is to treat the airlines' data as confidential.

As there could be no contractual breach (because there are no contractual confidentiality obligations owed to Sabre), Sabre resorted to the common law in arguing that IATA had breached a duty not to use the raw data for the PaxIS product.

Sabre relied on the Supreme Court of Canada's decision in *Lac Minerals v. International Corona Resources Ltd*.[36] which established a three-part analysis to be used in making out a case for the tort of breach of confidence. The Supreme Court found the relevant questions are:

- did the information conveyed have the necessary quality of confidence;
- was the information communicated in confidence; and,
- was the information misused by the party to whom it was communicated.

The trial judge resolved these questions in favour of IATA. Sabre challenged these findings.

[35] Refer to: http://www.lexcanada.com/data/TransportationNotes_Vol7-1.pdf

[36] [1989] 2 S.C.R. 574

With respect to the first branch of the Lac Minerals test, the appellate court acknowledged Sabre's reliance on the dicta in *Coco v. A.N. Clark (Engineers) Ltd.,*[37] where Megarry, J. wrote:

> *"… if the circumstances are such that any reasonable man standing in the shoes of the recipient of that information would have realized the upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."*

However, the appellate court upheld the trial judge's ruling on this point, noting that his —analysis correctly reflects the fact-sensitive nature of the analysis required.

As to the second branch of the Lac Minerals test, Sabre had to address the problem arising from the one-way nature of the confidentiality clause in the BSP agreements. In reaching his decision, the trial judge placed significant emphasis on the fact that these agreements contained an explicit confidentiality clause in favour of the airlines, but that it was silent on whether there were any similar obligations attaching to data entered into the system by Sabre. Because the issue of confidentiality had been contemplated when the agreements were drafted, and because no obligations were explicitly imposed with respect to data entered by Sabre, the trial judge found that, in the circumstance of this case, there were none.

Sabre argued that the trial judge failed to appreciate the true nature of the BSP agreements, the actual parties to those agreements and their purpose. In this regard, Sabre argued that: (i) the agreements were not between Sabre and IATA — but rather, between Sabre and various airlines; (ii) the BSP agreements were not commercial agreements in the —normal sense, but, rather technical industry agreements designed to create narrow and clearly delineated —zones of cooperation in a fiercely competitive business; and (iii) that the agreements had nothing to do with use of the data outside the BSP process.

The appellate court did not accept these submissions — holding that Sabre ignored: (i) IATA's very direct involvement in the creation of the BSP; (ii) the evidence that it was IATA's lawyers who drafted the confidentiality provisions in the first place; and (iii) that IATA was indeed a signatory to the agreements in various capacities over the years.

Next, Sabre argued that the trial judge erred in failing to place a heavy onus on IATA to rebut the conclusion that the information was imparted in confidence. Once again, Sabre's counsel cited Megarry in *Coco*:

> "*...where information of a commercial value is given on a business-like basis with some avowed common object in mind … I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence.*"

The appellate court distinguished *Coco* on this point because of the prospective nature of the information sharing contemplated by the parties and, as well, on the basis that unlike in *Coco*, there was an explicit confidentiality provision in place.

Sabre then argued that the trial judge erred by imposing a requirement that Sabre —clearly communicate the confidential nature of the data. This argument was also rejected. The appellate court noted that the trial judge was faced with a situation involving sophisticated business entities, who were aware of the nature of the information being provided and the commercial use of that information — and that they had contemplated circumstances in which confidentiality would apply to the information. Accordingly, the appellate court found that it was open to the trial judge to give considerable weight to the agreements' silence on confidentiality of information entered into the BSP by Sabre.

Finally, and related to the third branch of the Lac Minerals test, the appellate court dealt with Sabre's argument that the trial judge erred in holding that no duty of confidence could arise unless a reasonable person would have in mind the particular

[37] [1969] R.P.C. 41 (Ch)

misuse of the information that ultimately led to the dispute. In other words, Sabre argued that because PaxIS did not even exist when the information began to flow from Sabre to IATA, it would be unfair to require that Sabre foresee the creation of PaxIS in order to have its data protected.

The appellate court did not accept this argument and found that the trial judge had captured the nature of the claim, noting that the outcome of the case depended on whether a reasonable person would understand that Sabre's information was to be used only in the context of the BSPs.

In the end, the appellate court found that the legal principles, the elements of the claim and most of the primary facts were not in dispute. It held that the question was whether a reasonable person in IATA's position would in all the circumstances appreciate that the information from the ticket sales was given to it in confidence by Sabre.

The Court found that the trial judge considered the relevant factors, attributed the relevant significance to those factors and made a reasonable assessment of them.

The appeal was dismissed, with costs to IATA.

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FOCUS ON FRANCE

Emirates v. X. n° 09-71307, 1st Civil Chamber of the Cour de Cassation

French Cour de Cassation rules that claim for deep vein thrombosis does not amount to an accident under Warsaw Convention

By Judgment of 23 June 2011 (Emirates v. X. n° 09-71307), the 1st Civil Chamber of the Cour de Cassation reiterated the conditions for establishing an international air carrier's liability under art. 17 of the 1929 Warsaw Convention (and *mutatis mutandis* art. 17 of the Montreal Convention of 1999).

This is also the first French decision that expressly rules that deep vein thrombosis (DVT) is not an accident under art. 17 of the Warsaw Convention.

Background

Following a Colombo-Paris flight on 1st March 2004 operated by Emirates, with stopovers in Muscat and Dubai, a passenger suffered from DVT (the formation of a blood clot in a deep vein); this was diagnosed after his return to France.

Proceedings

The passenger commenced interlocutory proceedings against Emirates before the Paris courts, claiming damages on a summary basis for personal injury resulting from DVT, on the grounds that the airline was presumed liable. The court ordered a medical survey. The Court appointed medical expert concluded that there was no logical explanation for the DVT suffered by the claimant, other than the "economy class syndrome" of remaining seated too long. The court at first instance dismissed the claim, on the grounds that there appeared to be an arguable defence, and that the summary relief sought was inappropriate.

The claimant lodged an appeal to the Paris Court of Appeal.

The Court of Appeal (21 Sept. 2009) overturned the interlocutory order, finding the carrier liable under art. 17 of the Warsaw Convention, which provides that the carrier is liable for damage sustained in the event of wounding of a passenger or any other bodily injury suffered by a passenger, "if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

The Appeal court held inter alia that the Court appointed medical expert had concluded that the passenger's medical history did not reveal any particular sensitivity to thrombosis; the Court thus concluded that the presumption of liability under article 17 operated in favour of the passenger.

Emirates lodged an appeal against this decision before the Cour de cassation.

Arguments

The air carrier challenged the Court of Appeal ruling on the following grounds:

1. The presumption of liability under art. 17 of the Warsaw Convention only applies where injury results from an accident. The appeal judgment was thus inconsistent with the Warsaw Convention;

2. The Court of Appeal merely found that the precise cause of the injury was unknown and that there was no evidence of any previous pathology which could explain the DVT suffered by the passenger; it did not find that there had been any accident. In the absence of an accident, the Court of Appeal had erred in finding Emirates liable under the Convention.

Decision

The Cour de Cassation annulled the Court of Appeal judgment in an unequivocal ruling. The Supreme Court found that the Appeal court's findings of fact did not justify that the injury should be attributed to an accident; as a result there was no legal

basis for the appeal court judgment, which should thus be annulled in all respects.

For the Cour de Cassation, the DVT suffered by the passenger was not an accident within the meaning of art. 17 of the Warsaw Convention.

Comment

This ruling is consistent with the interpretation by the French courts of the notion of accident under art. 17 of the Warsaw Convention (and art. 17 of the Montreal Convention).

The French courts have repeatedly stressed and highlighted that an accident must be a sudden and exterior event. Such test therefore excludes all loss or injury resulting from an internal pathology of the passenger, and more generally any damage caused by or contributed to by the negligence of the injured person. The Cour de Cassation had previously held, in similar circumstances, that pulmonary embolism (also resulting from the formation of blood clots) suffered by a passenger is not as such an accident (Gillet v. Air Canada - 14 June 2007). Other decisions have also established that heart attacks, cardio-vascular accidents or deafness suffered by a passenger, even on flight, could not be construed as accidents either. All these decisions and the reasoning contained therein should logically also apply to the equivalent provisions of art. 17 of the Montreal Convention.

Scope

The decision rendered by Cour de Cassation is consistent with other court decisions from other parties to the Warsaw Convention (and the Montreal Convention) in respect of DVT claims.

Over the last decade, passengers have brought claims before the courts of various States for compensation for damage resulting from DVT. Authors have referred as a result to the *"economy class syndrome"*, to which the French court appointed medical expert had also alluded. Amongst previous decisions which have ruled that DVT is not an accident under art. 17 of the Warsaw Convention one can cite *Povey v. Qantas Airways Limited [2005] HCA 170 (*Australia) ; *Deep Vein Thrombosis and Air Travel Group Litigation [2005] UKHL 72* (House of Lords, England and Wales) ; *Blansett v. Continental Airlines, 379 F. 3d 177 (5th cir. 2001)* or *Caman v. Continental Airlines, Inc., 455 F.3d 1087 (9th Cir. 2006)* (USA); *McDonald v. Korean Air [2003] 171 OAC 368* (Canada); *Distr. Court of Tel Aviv (Dec. 2007), Zelaksonov v. El Al* (Israel) ; *Landgericht München I, 7 March 2001, n° 2902354/00, 2001* (Germany); *Trib. Busto Arsizio, Lombardia, 7 Jan. 2009, Meilan v. Air China*) (Italy). Several of these decisions refer directly to the case law of other State Parties.

The French Cour de Cassation's recent ruling is therefore consistent with the international interpretation of the Convention; the lack of any ambiguity in its judgment clearly sets an important precedent within France.

Furthermore, the common approach adopted in a number of jurisdictions, here confirmed by the French courts, is a perfect illustration of the will of the respective signatory states to try to adopt a uniform interpretation of the Convention. In this respect a French decision was awaited with interest as the Warsaw Convention was initially drawn up in French (art. 36), which was the version intended to prevail if clarification was required.

It also confirms that inspiration can and should be sought from decisions of the courts of other Convention countries (as observed by Lord Scott of Foscote in his opinion under abovementioned House of Lords judgment, at § 11.4).

Jean-Baptiste Charles and Olivier Purcell, Holman Fenwick Willan, France

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AVIATION AND THE ENVIRONMENT

EU Aviation Emissions – ECJ Decision on US airlines' case

On 21 December 2011, the European Union Court of Justice (the "ECJ") handed down its long-awaited judgment on the validity of the extension of the EU emissions allowance trading scheme (the "EU ETS") to aviation emissions. This arose from a referral by the English High Court to the ECJ for a preliminary ruling in relation to judicial review proceedings brought in the English courts by the Air Transport Association of America (the "ATAA") and certain US airlines (the "Airlines") against the UK Secretary of State for Energy and Climate Change over measures implementing the EU ETS in the UK.

The ECJ was required to determine whether the relevant EU legislation (Directive 2003/87/EC, as amended by Directive 2008/101/EC) contravened international treaty law, including the Chicago Convention, the Kyoto Protocol and the US-EU Air Transport Agreement (the "Open Skies Agreement"), and customary international law. The ECJ took the same position as the Advocate-General in her October opinion and ruled that the legislation was not invalid under applicable international law.

The ECJ held that as the EU is not party to the Chicago Convention (although all its Member States are) and has not assumed exclusive competence in the field of international civil aviation, the EU is not bound by the treaty and, therefore, its rules are not relevant to the question of validity of the EU ETS legislation. This meant that certain treaty provisions regarding extra-territoriality, sovereignty over airspace, nationality of aircraft and duty exemptions were not considered by the court, although many of the issues overlapped with provisions under the Open Skies Agreement and customary principles of international air law which the court did examine.

Although the EU has approved the Kyoto Protocol, the ECJ held that its rules are not unconditional or sufficiently precise to allow individuals the right to rely on it in legal proceedings contesting the validity or legality of an act of EU law. The key Kyoto provision relied upon by the ATAA and Airlines relates to the parties' agreement to work through the ICAO in relation to reduction of aviation emissions.

The ECJ accepted that the EU is bound by the Open Skies Agreement but did not find the relevant EU legislation infringed any of its provisions. In particular, the ECJ rejected the ATAA and Airlines' claim that Directive 2008/101 breaches Article 7 of the Open Skies Agreement by attempting to impose extra-territorial rules regarding emissions allowances. Article 7 requires aircraft to comply with EU laws only when the aircraft enter or depart a Member State's territory (or, in respect of rules governing operation and navigation of the aircraft, when the aircraft is within the territory). They claimed that the effect of the EU ETS when applied to aviation activities is to impose the scheme on aircraft not only when entering or departing a Member State but during any part of the flight over a third state or the high seas, because allowances are calculated based on fuel consumption during the entire (international) flight. This argument also required the court to consider the principles of a state's exclusive sovereignty over its airspace, that no state may validity assert sovereignty over the high seas and of freedom over the high seas.

The ECJ dismissed the claim on the basis that the scheme does not apply to aircraft registered in third states which only fly over third states, the high seas, or Member States without stopping. Because the scheme only applies to an operator of aircraft registered in a Member State or to an operator of aircraft registered in a third state if such operator chooses to operate routes arriving or departing from Member States, the relevant principles of territoriality and sovereignty of any third states are not infringed. In contrast, those aircraft physically located in the territory of a Member State are subject to the unlimited jurisdiction of the EU.

The ATAA and Airlines also contended that the EU ETS infringes Open Skies exemptions on duties and other charges on fuel loads. The ECJ ruled that the EU ETS is a market-based measure and not a duty or other charge on fuel loads. Further, the court pointed to provisions allowing both the EU and the US to exclude their Open Skies obligations for environmental reasons and emphasized that the scheme applies on a non-discriminatory basis, as required under the agreement.

The ATAA and Airlines have issued a statement that they will "comply under protest" with the ECJ ruling but are pursuing other options in the English courts and through governmental pressures. The scheme comes into force for aviation activities on 1 January 2012.

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The EU ETS: airline surcharges and antitrust law - a case of déjà vu?

Executive summary

Following the extension of the EU Emissions Trading Scheme (the "EU ETS") to airlines operating flights to and from countries in the EU on 1 January 2012, a number of airlines have announced new passenger surcharges.

The Commission will be keen to see full compliance with EU ETS and to see its decision to add aviation to ETS vindicated, whilst the airline industry is faced with significant added operational costs as a result of being required now to participate in EU ETS. Surcharging is one means of combating the additional cost but care should be taken in introducing surcharges to avoid the potential pitfalls of anti-trust law.

Airlines would be advised to take care in announcing surcharges to avoid any implications that some form of private agreement has been reached, and should also be careful to ensure that any public announcements do not appear designed to coordinate a pricing response to the EU ETS.

A sense of déjà vu

Several airlines have announced similar surcharges said to be intended to recover the costs that the airlines now incur in order to comply with the EU ETS.

The coordinated imposition of surcharges by airlines and freight forwarders has been a subject of antitrust infamy on both sides of the Atlantic over the previous ten years:

- In 2010, the European Commission (the "Commission") imposed fines totalling €799,445,000 on 11 air cargo airlines (including Air France, Air Canada, British Airways, and Singapore Airlines). The Commission found that the airlines had coordinated their action on surcharges for fuel and security, without discounts, over a six year period, terminating in February 2006.
- The Commission is also separately investigating freight forwarding companies in relation to coordination on surcharges for fuel and security, without discounts, over a six year period.
- The Office of Fair Trading in the United Kingdom is separately pursuing British Airways in connection with fuel surcharges on passenger flights across the Atlantic imposed by it and Virgin.
- The same offences have been prosecuted by the antitrust authorities in the US, with companies facing large fines and damages actions by consumers, and prison sentences have been imposed on executives.

The actions of airlines may attract the attention of the European authorities

The issue of surcharges in relation to the EU ETS may provoke a response from the Commission:

- The Commission expects the cost of complying with the ETS to become one of the parameters of competition between airlines, harnessing competitive forces to drive further reductions in CO2 emissions by aircraft flying to and from the EU. If clusters of airlines are perceived instead to be passing the costs of compliance on to consumers, that may be seen as an attempt to undermine the potential for CO2 emissions to be reduced through a competitive process.
- Recently announced surcharges have been reported as being in excess of the actual cost of complying with the EU ETS. That will be vehemently disputed by the airline industry for whom the EU ETS represents a very significant added financial burden (and/or places severe restrictions on their ability to maintain and develop their operations). However, there is a risk of attracting attention from the Commission if the misleading impression is created that surcharging is providing airlines with a windfall from consumers.
- The introduction of surcharges at the same time and at similar levels could be viewed as being consistent with an agreement between airlines which might amount to an infringement of the competition rules, along similar lines to previous surcharges cases.

Taken cumulatively, these considerations may expose airlines to a detailed antitrust scrutiny of the manner in which decisions to increase surcharges are taken.

When will the announcement of identical surcharges amount to an antitrust infringement?

Under EU law, agreements or concerted practices between businesses which have the restriction of competition as their object or effect are illegal. The most egregious types of infringement include price fixing ("object" infringements), such as the agreements reached between competitors to introduce surcharges in the airline freight forwarding sectors, set out above.

The introduction of identical surcharges by airlines at near identical times could be deemed to amount to cartel activity, if the collective actions are considered to constitute a form of agreement, as defined by EU antitrust law.

An anti-competitive agreement can involve direct or indirect contact between competitors, the object or effect of which is to influence conduct on the market of an actual or potential competitor. The contact can be one-way in nature, whereby one company communicates its future strategy on the market to another. Such a communication may be deemed to constitute an agreement between both companies (and both companies could face sanction).

The nature and form of the contact will determine whether or not the contact amounts to an agreement. EU competition law does not deprive companies of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors. To this end, where a company makes a unilateral announcement which is genuinely public, and its competitors react to this news by following the conduct announced by the company, this generally will not constitute an agreement for the purposes of EU antitrust law. A genuinely public announcement would be one which is easily available to all customers and competitors of the company making the announcement.

The Commission does however reserve its right to pursue public exchanges of information between competitors where it considers that the reciprocal

announcements constitute a proxy for reaching a common understanding on the strategy to be adopted. This type of exchange is more likely in oligopolistic markets in which there are a few large players.

Under EU antitrust law, relevant markets for airlines are defined on the basis of origin and destination points (O&D markets). Each O&D market will likely have a handful of airlines operating on it, leaving the market vulnerable to a reduction in competition as a result of information exchanges between competitors, potentially even if these exchanges are public in nature.

In the case of public announcements on surcharges in response to the introduction of the ETS, airlines may be able to counter any suggestion of agreement through public announcements alone by pointing to the fact that they are each responding to the introduction of the ETS on 1 January 2012. This fact may be relied on to explain why announcements are made at approximately the same time. However, further explanation may be required if the focus is rather on the announcement of identical surcharge amounts.

Implications for airlines

If non-public exchanges of information take place between airlines in relation to pricing responses to the EU ETS, there is a danger that such exchanges could be in breach of the EU antitrust rules, in a similar manner to previous anti-competitive agreements over surcharges.

Even if there are no private communications, and surcharge announcements are the result of each airline responding to the public announcements of another airline, there could still be antitrust scrutiny if the implementation of surcharges gives any impression of being co-ordinated. This is particularly the case given the political climate, in which the Commission hopes to see the ETS become a tool for the reduction of CO2 emissions, rather than as a cost which is simply passed on to consumers.

Airlines considering the implementation of surcharges should take particular care to assess whether their actions will raise suspicions. They should ensure that their decisions on surcharges are taken in a demonstrably independent manner.

The Commission's investigative powers enable it to conduct dawn raids on premises within the EU. In recent years, where premises have been located within the United States, the Commission has acted in concert with US authorities, conducting simultaneous dawn raids. Whether the US authorities (who strongly oppose the extension of the EU ETS to airlines) would be interested in participating in such an investigation is unclear.

Enforcement action by European authorities could lead to the imposition of substantial fines, as well as other sanctions such as director disqualification and possible criminal prosecutions (by certain national authorities). Airlines who are concerned that they may have been involved in an infringement can avoid liability through the Commission's leniency programme, by blowing the whistle on any anti-competitive activity.

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UPCOMING EVENTS

ALAANZ 2012 Annual Conference

Date: 1 – 3 April 2012

Place: The Heritage Hotel
Queenstown
New Zealand

For the conference program go to:

http://www.alaanz.org/pdf/ALAANZ-2012-Preliminary-Program.pdf

For the registration form go to:

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